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MOHAMMAD AZANUL HAQIMI TUAN AHMAD AZAHARI v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
BALIA YUSOF WAHI FCJ
B TENGKU MAIMUN TUAN MAT FCJ
ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NO: 05(HC)-134-05-2018(B)]
17 JUNE 2019

C

PREVENTIVE DETENTION: *Habeas corpus – Detention order – Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 – Representation before Advisory Board – Right to be represented by counsel – Request for second adjournment refused – Advisory Board proceeded to hear applicant without counsel*
D *– Whether a serious procedural breach – Whether writ to be issued – Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3 & 9*

EVIDENCE: *Adverse inference – Detention order – Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 – Application for writ of habeas corpus – Representation by counsel at hearing of representation – Whether denied*
E *by Advisory Board – Conflict of evidence – Minutes of Board hearing – Whether material evidence – Refusal to disclose minutes to court – Whether a suppression of material evidence – Whether attracting adverse inference – Evidence Act 1950, s. 114(g) – Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3 & 9*

F In this appeal against the decision of the learned Judicial Commissioner ('JC') refusing the appellant's application for a writ of *habeas corpus* for his release from detention pursuant to a detention order issued under s. 3 Dangerous Drugs (Special Preventive Measures) Act 1985, issues arose as to: (i) whether the appellant was denied the right to be represented by counsel at the hearing of his representation before the Advisory Board ('the Board');
G and (ii) whether, upon the conflicting evidence adduced by the appellant and the respondents as to what actually transpired at the hearing, with the appellant alleging that he was denied a second postponement by the Board thereby denying him an opportunity to engage a counsel and the respondents averring that it was the appellant himself who had opted to proceed without
H counsel, the refusal by the respondents to produce the minutes of the Board hearing as requested by the learned justices herein amounted to a withholding of material evidence such as to call for the invocation of an adverse inference against the respondents. It was not in dispute that the sole reason given by the respondents for refusing to disclose the minutes of the hearing to the court
I was because it was 'rahsia' or classified.

Held (allowing appeal; issuing writ of *habeas corpus*)
Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) It has always been the case with our criminal law that where there are two inferences open against the accused, especially in the face of conflicting evidence, the one most favourable to the accused is to be preferred. There is no reason why the approach should be different in respect of detainees in *habeas corpus* cases. (para 18)

(2) Where a detainee challenges his detention as being illegal, the burden lies on the detaining authority to show that the detention is legal. Since the burden to justify the detention lies on the respondents, their failure to adduce the minutes of the Board hearing amounted to a wilful withholding of material evidence. Thus, this case not only called for an inference favourable to the appellant, it also called for an adverse inference against the respondents. The court would presume that had the respondents adduced the contents of the minutes of the Board hearing, the contents of those minutes would have been unfavourable to them. (paras 11 & 21)

(3) The learned JC, in faulting the appellant for failing to explain why he needed the second adjournment, had failed to appreciate the legal principles as enunciated in *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia.* The learned JC ought to have resolved the conflict in evidence thus arising in favour of the appellant. (paras 23 & 24)

***Bahasa Malaysia** Headnotes*

Dalam rayuan terhadap keputusan yang arif Pesuruhjaya Kehakiman ('PK') di sini kerana menolak permohonan perayu untuk writ *habeas corpus* bagi membebaskan dirinya daripada tahanan di bawah perintah tahanan yang dibuat di bawah Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985, isu-isu berbangkit: (i) sama ada perayu tidak diberi peluang untuk diwakili oleh peguam semasa pendengaran representasinya di hadapan Lembaga Penasihat ('Lembaga'); dan (ii) sama ada, berdasarkan keterangan bertentangan yang dikemukakan oleh perayu dan responden mengenai apa yang sebenarnya berlaku di pendengaran, dengan perayu berkata permohonan penangguhan keduanya ditolak oleh Lembaga sekali gus menyebabkan beliau tidak dapat mengambil peguam dan responden bertegas bahawa perayu sendiri yang memilih untuk meneruskan pendengaran tanpa peguam, keengganan responden mengemukakan minit pendengaran representasi Lembaga seperti yang diminta oleh yang arif hakim-hakim di sini merupakan satu perbuatan menyorok keterangan yang menjustifikasikan pengenaan anggapan bermudarat terhadap responden. Tidak dinafikan bahawa satu-satunya alasan yang diberi oleh responden atas keengganannya mengemukakan minit pendengaran tersebut adalah bahawa minit tersebut adalah rahsia.

Diputuskan (membenarkan rayuan; mengeluarkan writ *habeas corpus*) Oleh David Wong Dak Wah HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Dalam undang-undang jenayah, sudah menjadi ikutan biasa bahawa apabila wujud dua inferens terhadap tertuduh, terutama dalam keadaan keterangan-keterangan bercanggah, yang dipilih adalah versi yang lebih berfaedah kepada tertuduh. Tiada alasan mengapa pendekatan yang sama tidak terpakai kepada orang tahanan dalam kes-kes *habeas corpus*.

(2) Apabila seorang orang tahanan mempertikai penahanannya sebagai tak sah, maka menjadi tanggungjawab pihak berkuasa yang menahan untuk membuktikan penahanan adalah sah. Oleh itu, oleh kerana beban untuk menjustifikasi penahanan adalah atas responden, maka kegagalan mereka mengemukakan minit pendengaran Lembaga adalah terjumlah kepada perbuatan sengaja menyembunyikan keterangan penting. Maka kes ini bukan sahaja menuntut pemilihan inferens yang lebih berfaedah kepada perayu, tetapi menuntut juga supaya inferens bermudarat dikenakan terhadap responden. Mahkamah membuat anggapan bahawa jika kandungan minit pendengaran Lembaga tersebut dikemukakan, ia tidak akan menguntungkan responden.

(3) Yang arif PK, dalam mempersalah perayu kerana gagal menjelaskan kenapa beliau memerlukan penangguhan kedua, jelas gagal menilai prinsip undang-undang seperti yang diutarakan dalam *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia.* Yang arif PK sepatutnya memutuskan percanggahan keterangan tersebut secara yang berpihak kepada perayu.

Case(s) referred to:

Lui Ah Yong v. Superintendent of Prisons, Penang [1975] 1 LNS 91 HC ***(refd)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Satu Lagi [1994] 4 CLJ 47 SC ***(refd)***

Re Roshidi Mohamed [1987] 1 LNS 59 HC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***

Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 9(1)

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 4(3)

Evidence Act 1950, s. 114(g)

For the appellant - Sivananthan Nithyanantham & Jay Moy Wei Jiun; M/s Sivananthan
For the respondents - Muhammad Sinti; SFC

[Editor's note: For the High Court judgment, please see Mohammad Azanul Haqimi Tuan Ahmad Azahari lwn. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain [2018] 1 LNS 1533 (overruled).]

Reported by Wan Sharif Ahmad

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

Introduction

[1] This appeal stemmed from the decision of the High Court refusing to issue the appellant a writ of *habeas corpus*. We heard the appeal on 12 February 2019 and after careful consideration, unanimously allowed it. We set aside the order of the High Court, allowed the appellant's application for a writ of *habeas corpus* and ordered that he be released from detention with immediate effect. These are our written reasons.

Background

[2] The appellant was arrested on 21 February 2017 under s. 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act). Upon investigation and submission of the various reports to the first respondent, the first respondent exercised his discretion to issue a detention order (detention order) dated 19 April 2017 detaining the appellant at Pusat Pemulihan Akhlak Machang, Kelantan for two years effective from the date of issuance.

[3] At the High Court, the appellant argued that he was entitled to a writ of *habeas corpus* citing at least 22 procedural errors. However, at the hearing of his application, the appellant narrowed down his complaints into a single issue. He argued that he was denied his right to be represented by counsel.

[4] The complaint arose in the following way. Under s. 9 of the Act, a copy of every order of the Minister permitting detention must be served on the detainee and such detainee has the right to make representations to the Advisory Board (the Board) on his detention. The evidence indicated that the appellant wanted to be represented by counsel during his representation before the Board.

[5] The hearing before the Board was fixed on 6 June 2017. This was communicated to the appellant on 22 May 2017. It was undisputed in the court below that come 6 June 2017, the appellant had not yet appointed counsel. The hearing was therefore duly rescheduled to 11 July 2017.

[6] Come 11 July 2017, the appellant appeared again before the Board. Upon reading all the affidavits, we are faced with two conflicting versions of the rest of the story.

[7] The appellant claimed that he had only met and appointed his counsel on the date of the said hearing. But, his counsel advised him to seek an adjournment so that he may be prepared – having of course, then just been appointed. The appellant claimed that his request for a second adjournment was denied and the hearing proceeded without his counsel. He claimed this was a denial of his right to be represented by counsel.

[8] The respondents, in turn, took the position that on the date of the hearing, the appellant appeared with his lawyer. They said that the appellant indicated his intention not to be represented by a lawyer, refused the offer of an adjournment, and chose to continue with the proceedings.

The Decision Of The High Court

[9] The pertinent part of the High Court's decision may be gleaned from the following two paragraphs of its judgment:

> [13] Isu di sini ialah percanggahan di dalam affidavit Ahmad Lazimi sendiri dan bertentangan dengan affidavit Pemohon. Ahmad Lazimi mengatakan pada 11.7.2017 Pemohon tidak mohon penangguhan dan apabila ditanya Pemohon mengatakan dia tiada peguam dan ingin meneruskan representasinya.
>
> [14] Sungguhpun terdapat percanggahan di dalam affidavit Ahmad Lazimi, bagi saya, ianya tidak menjejaskan penahanan Pemohon. Fakta kes ini berbeza dengan kes *SK Takaliswaran (supra)* yang jelas sekali bertentangan atau percanggahan di antara dua deponen. Pemohon pula tidak menyatakan alasan kepada Lembaga Penasihat mengapa penangguhan diminta kerana penangguhan telahpun diberi pada masa pendengaran pertama dan masa yang mencukupi telah diberikan daripada mula tarikh perintah tahanan dikeluarkan. Malah jarak masa di antara pendengaran pertama dan kedua lebih daripada sebulan.

Our Decision

[10] The law on *habeas corpus* is trite. It is not a discretionary remedy. The writ must be issued if the court finds that the detenu is illegally or improperly detained. See: *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 where at p. 281, Abdoolcader J (as he then was) said as follows:

> The grant of *habeas corpus is* as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as *certiorari*, prohibition and *mandamus*. It is a writ of right against which no privilege of person or place can be of any avail (*R v. Pell And Offly* 84 ER 720. The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of *habeas corpus* and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel Evans v. Broaddus* 245 Mo 123 140 that at least in times of peace every human power must give way to the writ of *habeas corpus* and no prison door is stout enough to stand in its way.

[11] Where a detainee challenges his detention as being illegal, the burden lies on the detaining authority to show that the detention is legal. In *SK Tangkaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705, Gopal Sri Ram FCJ held as follows at p. 710:

> It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals* [19881 1 LNS 162. In *Mohinuddin v. District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 22 of the Indian Constitution from which is drawn our art. 151:
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> > It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

[12] Even if a detention was originally made in exercise of valid legal power, it may subsequently become invalid over a passage of time. See *Lui Ah Yong v. Superintendent of Prisons, Penang* [1975] 1 LNS 91; [1977] 2 MLJ 226 where at pp. 227-228 Arulanandom J said:

> The second limb of the argument merits greater consideration, ie, whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons. The answer to this question will necessarily determine the result of this application ... In view of this it is quite obvious that the authorities have exhausted all avenues and are unable to remove the applicant to his place of embarkation or his country of citizenship. The powers of detention under section 34(1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, ie, the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, then it cannot be argued that further detention remains lawful. The purpose of the detention having been frustrated, continued detention a *fortiori* becomes unlawful.

[13] Further, the applicant is entitled to take advantage of any technical defect which has the effect of invalidating his detention. See *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47 where at p. 55, Wan Yahya SCJ held as follows:

A [I]in cases of this nature the appellant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order; or to use the precise words of Regby J in *Ex Parte Johannes Choeldi & Ors.* [1960] 26 MLJ 184 at 186:

> The distinction, no doubt, is a highly artificial one. But this is an application for a writ of *habeas corpus*, and the applicants in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

[14] Was there a technical defect here? Section 9(1) of the Act mandatorily entitles any detainee the right to make representations before the Board. Rule 4(3) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 (1987 Rules), enables the detenu to make representations either personally or through his representative.

[15] Some detainees may think that counsel can make better representations than they can themselves make. So to us, it is a logical conclusion that where a detenu is denied the right to representation *via* counsel, he would effectively be denied his entire right to make representations.

[16] The above statutory requirements are mandatory and so must be complied with strictly. This is because we were here dealing with the crucial subject of the liberty of a person detained without trial. All the more we considered that his right to make representations could not have been superfluous, meaningless or a mere façade. It has been held that failure to comply with strict requirements may render a detention unlawful. See: *Re Roshidi Mohamed* [1987] 1 LNS 59; [1988] 2 MLJ 193, at p. 196.

[17] Now, whether the appellant was allowed the right to counsel was unclear from the conflicting affidavit evidence. The appellant cited to us the decision in *SK Takaliswaran (supra)* which decision we think is on all fours. In that case, this court at p. 710 dealt with the subject of conflicting affidavit evidence in a *habeas corpus* case as follows:

> It is for the respondents to prove that the constitutional and statutory safeguards embodied in art. 151 and s. 6(1) were strictly complied with. The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute ... And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection ... *Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as*

> *important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him.* Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn. (emphasis added)

[18] It has always been the case with our criminal law that where there are two inferences open against the accused, especially in the face of conflicting evidence, the one most favourable to the accused is to be preferred. See generally: *Yusoff Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; [1992] 2 MLJ 183 (Supreme Court). We did not see why the approach should be any different in respect of detainees in *habeas corpus* cases. After all, laws which deprive a subject of his right to personal liberty ought to be accorded the same strict construction as penal laws. In *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [19941 4 CLJ 47, at p. 55, Wan Yahya SCJ had this to say:

> Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws – see *Nagin Singh v. Jagannath*, AIR 1944 Lah 422.

[19] In all fairness to the respondents, during the hearing of this appeal, we asked them whether they could adduce the minutes of the Board hearing to support their version of the events. The said minutes constituted material evidence solely within the respondents' custody. We were met with the response that said minutes were 'rahsia'. To us, this argument did not hold water.

[20] Firstly, this court could have viewed that evidence *in camera*. Secondly and in any case, we need only to read the alleged portion proving that the respondents' version of the story was accurate. Nothing more.

[21] Since the burden to justify the detention lies on the respondents, we considered their failure to adduce the said minutes amounted to a wilful withholding of material evidence. Thus, to us, this case not only called for an inference favourable to the appellant, it also called for an adverse inference against the respondents. Simply, we presumed that had the respondents adduced the contents of the minutes of the Board hearing, the contents of those minutes would have been unfavourable to them. See generally: s. 114(g) of the Evidence Act 1950 and the judgment of this court in *Takako Sakao v Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 where at para. 5 Gopal Sri Ram FCJ held as follows:

> Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693...

In *Wisniewski v. Central Manchester Health Authority* [1998] P1QR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v. British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

> From this line of authority I derive the following principles in the context of the present case:
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> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
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> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
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> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
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> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

[22] Granted that *Takako* was a civil case and that it dealt with the failure to call a material witness, we think the general effect of drawing an adverse inference was lucidly explained and that it is of universal application. We considered it applicable in the context of the present case.

[23] The court below appeared to have faulted the appellant for not explaining why he needed the second adjournment. We thus arrived at the view that the learned Judicial Commissioner failed to appreciate the legal principles borne out in *Tangakaliswaran (supra)*.

[24] The learned Judicial Commissioner ought to have resolved the conflict in the evidence in favour of the appellant. In any event, the material evidence capable of corroborating the respondents' version was within their control, yet they did not see it fit to produce it.

[25] We were accordingly of the view that the learned Judicial Commissioner fell into error in failing to appreciate these settled principles of law. Had he considered them, we thought he would have been minded to find that there was clear non-compliance with the mandatory provisions of the law entitling the appellant to a writ of *habeas corpus*.

Conclusion

[26] Based on the foregoing, we considered this an appropriate case for appellate intervention. In our considered view, the detaining authority did not meet its burden to satisfy us that the strict requirements of the law were met. We therefore considered the detention to be unlawful and so we allowed the appeal. We, accordingly issued a writ of *habeas corpus* and ordered that the appellant be released forthwith.